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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE AETNA CASUALTY AND SURETY COMPANY, AETNA INSURANCE COMPANY, AMERICAN EMPIRE INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, COMPAGNIES D'ASSURANCES DU GROUPE CONCORDE, CONTINENTAL CASUALTY COMPANY, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, HARTFORD FIRE INSURANCE COMPANY, INDUSTRIAL INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, SECURITY INSURANCE COMPANY OF HARTFORD, THE TRAVELERS INDEMNITY COMPANIES, UNDERWRITERS AT LLOYD'S AND ASSOCIATED BRITISH INSURANCE COMPANIES, UNITED STATES FIDELITY AND GUARANTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND ZURICH INSURANCE COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA, BERNARD C. GROSECLOSE, ALDEN E. HARE, WILLIAM L. HOGAN and DENNIS L. HUNTER,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Preliminary Statement

Petitioners herein are submitting this reply brief because respondents in their brief in opposition have taken a position that does not comport to the actual facts and circumstances of this case. The Solicitor General is contending that, even if there had been misconduct by opposing counsel during trial so as to deny petitioners a fair jury trial against the individual respondents, such misconduct, in the final analysis, made no difference since the case against the Government was decided by the District Court Judge who could not be prejudiced. In order to reach this unique conclusion, the respondents argue that the record shows that the individual respondents were not liable and that even if they were the decision by the District Court in favor of the Government bars petitioners' claim against the individual respondents under 28 U.S.C. §2676. In advancing this position the Solicitor General has apparently recognized that there was misconduct by opposing counsel but has incredibly argued that it made no difference to the outcome of the case.[1]

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[1]In addition, in footnote 4 on page 4 of respondents' brief, the Solicitor General has opposed petitioners' pending motion to defer consideration of the petition on the ground that the "outcome of the passenger cases in the Court of Appeals cannot affect the decision in this case." However, the Solicitor General has failed to apprise this Court that in two of the cases that are still under consideration by the Fourth Circuit on Eastern's petition for a rehearing *in banc* (in which cases Eastern brought third-party actions against the Government seeking contribution from the Government), the Government not only submitted a brief in opposition to the motion for a rehearing *in banc* but also argued on the merits on the rehearing on February 8, 1983. Clearly, any decision by the Fourth Circuit on Eastern's motion for a rehearing *in banc* would affect petitioners' instant petition. If the Court of Appeals denies Eastern's petition, Eastern will probably petition to this Court and if the Court of Appeals reverses the Panel below, their opinion will probably be relevant to this Court's consideration of petitioners' petition for writ of certiorari. Therefore, petitioners respectfully pray that this Court defer consideration of the instant petition until such time as the Court of Appeals has rendered a final decision on Eastern's petition for a rehearing *in banc*.

Argument

As has been implicitly recognized by respondents, and as has been discussed at length in the petition (Pet. 5-13), the prejudicial remarks and comments made by opposing counsel were so intense, unabating, blatant and beyond judicial control that petitioners herein were clearly denied a fair and impartial jury trial in their claims against the individual respondents. In attempting to obscure the real issue before this Court, respondents have stated as the grounds for their opposition that "[t]he decision of the Court of Appeals is correct, does not conflict with any decision of this Court or any Court of Appeals and presents no issue warranting review" (Resp. 4). However, the actual issue before this Court is whether opposing counsel's conduct during trial, which was sanctioned by the majority opinion below, "was such a departure from the accepted and usual course of judicial proceedings so that petitioners were denied a fair jury trial against the individual respondents and prejudiced in their case against the respondent United States" (Pet. i). Indeed, respondents, rather than addressing the merits of the petition, merely paraphrase the Court of Appeals' majority opinions and conclude that even if petitioners were prejudiced: (1) "[t]he challenged arguments of counsel were adequately dissipated by the general cautionary instructions of the trial judge" (Resp. 6); (2) "[t]he evidence adduced readily explains the jury's determination that if there was any negligence on the part of the traffic controllers it was, in the district court's stated analysis, 'a remote rather than proximate cause' " (Resp. 6) and that additionally "[t]his court has often held it will not 'review concurrent findings of fact by two courts below "except" upon a very obvious and exceptional showing of error' " (Resp. 7); and (3) since "petitioners' claim against the United States was tried to the Court" Judge McMillan "was capable of rejecting any prejudicial comments of counsel" (Resp. 9).

1. As recognized by Judge Murnaghan, the so-called cautionary remarks by the District Court were inadequate to prevent the jury from being prejudiced by opposing counsel's com-

ments (A45-A47). In fact, the District Court not only failed to restrain counsel from their prejudicial outbursts and comments but compounded the prejudice by inadequately instructing the jury on petitioners' claim.

Petitioners had requested the District Court to charge the jury as a matter of law that both the pilots of EA 212 and the air traffic controllers had a concurrent responsibility for the safety of the aircraft and the passengers (Supp. Inst. No. 39, JA-VI, 2118-19). The District Court refused to give such an instruction and instead repeatedly told the jury that the issue of whether or not the air traffic controllers had a duty to the passengers and the aircraft was a *factual* issue for them to decide (JA-VI, 2794, 2795, 2797-98, 2809-10, 2811). The District Court should have instructed the jury that the air traffic controllers had a concurrent responsibility with the pilots for the safety of the flight, and that this duty could be breached by a failure to exercise a common law duty of due care or by a failure to comply with specific Government manuals and orders. Indeed, the District Court finally recognized this as a correct statement of the law in its final judgment (JA-I, 504-12).

The District Court also refused to instruct the jury as to the nature of the contribution suit, on the basis that the jury was only considering the issue of liability (JA-VI, 2803, Supp. Inst. No. 38). Clearly the refusal to so instruct the jury was prejudicial error particularly in view of the witness testimony and charges by opposing counsel that the contribution suit was a "cop-out" and an attempt to avoid responsibility. Under such circumstances, the District Court was obligated to instruct the jury that petitioners were pursuing a legitimate claim recognized under North Carolina law. *See* 9 Wright & Miller, Federal Practice and Procedure, §2255, at 654 (1971) ("It is the inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case, and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for truth"). *Accord, Price* v. *Glosson Motor Lines,* 509 F.2d 1033 (4th Cir. 1975); *United States* v. *Holley,* 502 F.2d 273 (4th Cir. 1974).

Furthermore, during the trial it had been the position of the petitioners that the negligence of the respondents occurred when EA 212 descended below 1,800 feet MSL about two miles before the Ross Intersection and the controllers failed to notice and warn of this deviation from the prescribed flight path (JA-II, 662; JA-VI, 2669-70). In its charge to the jury, however, the District Court presented petitioners' contentions in terms of whether or not the controllers should have noticed the low approach of EA 212 and used the ARTS III to guide the airplane down to the runway for a safe landing (JA-VI, 2795-99). At the post-instruction conference, petitioners' counsel pointed out this error and restated petitioners' position (JA-VI, 2806). Upon return to the courtroom, the District Court attempted to restate petitioners' contentions, but again did it in a vague and improper fashion (JA-VI, 2809-10), and then sent the jury out to deliberate without giving counsel another opportunity to object (JA-VI, 2812).[2]

Finally, the District Court failed to instruct the jury properly with respect to the individual respondents' common law and regulatory duty to observe Eastern 212 and advise the pilots of EA 212's low altitude. The District Court charged:

> "Well, you heard a lot of evidence on that subject, and I'm stating it very grossly and perhaps inaccurately. It's up to you to remember all the evidence and to make findings on the subject, and if the controllers assumed the duty and had imposed upon them a duty to give warning to pilots that were seen to be flying too low; and if you find, as Eastern and Aetna contend, that they did see and did fail to use reasonable efforts to warn the pilot and that such reasonable efforts would have got a message to the pilot and the pilot would have pulled up and the accident would have been prevented, if you find all of those facts in favor

[2]The failure to properly present petitioners' theory of the case to the jury was reversible error. *See McCullough* v. *Beech Aircraft Corp.*, 587 F.2d 754 (5th Cir. 1979); *Swietlowich* v. *County of Bucks*, 610 F.2d 1157, 1163 (3d Cir. 1979); *Brandes* v. *Burbank*, 613 F.2d 658 (7th Cir. 1980).

> of Eastern and Aetna and that such action or inaction by the controllers was one of the proximate causes of the accident, then you would find that the controllers had a joint responsibility with Eastern for the safe operation of the plane." (JA-VI, 2796-97).

This charge was completely erroneous. It was not a question of the controllers assuming the duty and having a duty imposed on them to give warnings. The manuals and the common law imposed a duty to give a warning if the controller saw any danger. Further, it was not a question of the jury finding a "joint responsibility"—the jury should have been instructed that if they found as the Court instructed, the respondents were negligent and liable to the petitioners. The charge with respect to the regulatory duty was equally erroneous (JA-VI, 2797-99).

In addition, the Court further instructed the jury that the petitioners had to prove that the controllers had a duty "to keep a constant watch on the radar display and to take constant note on the altitude of the plane. . . ." (JA-VI, 2810-11). However, petitioners had never claimed that the individual respondents had to constantly watch the altitude readout on the radarscope—only that they had to keep a reasonable watch under the circumstances (Petitioners' Proposed Jury Instructions Nos. 26 and 31, R. 119). The District Court's instruction on this issue had the effect of abrogating the legal theory of negligence and placing a burden on the petitioners to prove something beyond what a reasonably prudent controller would do under the circumstances. In summary, both the outrageous misconduct by opposing counsel and the clearly erroneous charge to the jury on petitioners' claims, combined to deny petitioners a fair, impartial and proper jury trial.

2. Respondents offer an abbreviated and biased statement of the facts, and summarily conclude that if there was any negligence by the individual respondents, then that negligence was at most a remote rather than a proximate cause (Resp. 6). However, as discussed in detail in the petition (Pet. 13-16), the negligence of the individual respondents was blatant and the only

explanation for the jury's exoneration of the individual respondents was the prejudicial comments by opposing counsel and the failure of Judge McMillan to properly charge the jury and explain to the jury that a claim for contribution was not a "cop-out" or a "lack of accountability" or a "monster on the loose".

For the Solicitor General to argue that this Court should not consider the petition because two courts have looked at the facts of this case and concluded that there was no negligence on the part of respondents, is to ignore the realities of the situation. Although the Court of Appeals devoted 64 pages to deciding the consolidated appeals (A1-A48), not one sentence is devoted to a substantive discussion of the specific arguments raised for or against petitioners' main point on appeal that the District Court's findings that the Government was not negligent were clearly erroneous, not supported by the evidence, and contrary to law. Therefore, it is quite obvious that the Court of Appeals avoided the factual issues by erroneously concluding that as a matter of law a judgment against the Government bars a judgment against its employees (A48).

3. On page 9 of their brief, respondents conclude that there is "no substantial likelihood that the alleged misconduct of counsel actually prejudiced petitioners, and there is accordingly no need for further review of petitioners' contentions." (Footnote omitted). Respondents reach this conclusion on the basis that petitioners' claim against the Government was tried by Judge McMillan, who allegedly was capable of rejecting any prejudicial statement by trial counsel, and that under 28 U.S.C. §2676 Judge McMillan's decision in favor of the Government allegedly bars petitioners' claim against the individual air traffic controllers. Petitioners respectfully submit that respondents' conclusion is erroneous and that the reasoning underlying respondents' conclusion is faulty.

Specifically, it is absolutely immaterial that Judge McMillan ultimately decided petitioners' claim against the Government in favor of the Government, since Judge McMillan had the opportunity to pass on that claim on the merits *only* because the jury

found in favor of the individual controllers on petitioners' claim against the individual controllers. As discussed in detail on pages 16-17 of the petition, if the jury had found in favor of petitioners against the individual controllers, then petitioners would have moved for a directed verdict against the Government on the basis of *respondeat superior*. Since the pleadings established that at all times the controllers were acting within the course and scope of their employment, petitioners would submit that the District Court would have been required to grant them a directed verdict against the Government. *See Thomas* v. *Poole*, 45 N.C.App. 260, 262 S.E.2d 854, 856, *petition denied*, 300 N.C. 202, 269 S.E.2d 628 (1980). *See also Jackson* v. *Mauncy*, 260 N.C. 388, 132 S.E.2d 899 (1963); *Kiser* v. *Neumann Co. Contractors*, 426 S.W.2d 935, 938 (Ky. 1967); *Restatement (Second) of Agency* §219(1). This potential vicarious liability of the Government, which would become vested upon a jury verdict against the individual controllers, was very clearly recognized in the Fourth Circuit's initial decision in this litigation:

> "As heretofore noted, the plaintiffs allege, and the Government admits, that the controllers were acting within the course and scope of their employment at the time of the crash, and under such circumstances *any finding of negligence against them would be imputable to the Government and place liability upon it under the Tort Claims Act.*"

Aetna Cas. & Sur. Co. v. *United States*, 570 F.2d 1197, 1201 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978) (emphasis added).

Since the jury's finding on the claim against the individual controllers *preceded* Judge McMillan's determination of the claims against the Government, and since petitioners would have been entitled to a directed verdict on their claim against the Government if the jury found in petitioners' favor on their claim against the individual controllers, any prejudicial effect on the jury of improper remarks by trial counsel obviously would prejudice the petitioners. By virtue of the Seventh Amendment, petitioners were entitled to a trial by jury on their

claims against the individual controllers, and the fact that Judge McMillan found in favor of the Government cannot be accepted as excusing any improper remarks by trial counsel that affected the jury.

In a half-hearted attempt to refute this, respondents argue in footnote 11 of their brief that "Even if the jury had found against the individual respondents, the judgment of the district court for the United States under the FTCA would have constituted a bar to the claims against the FAA employees." It is simply incredible that respondents would argue such a position in this Court, particularly since respondents' own cited case law supports the principle that the Government is liable for the acts of its employees, not respondents' illogical theory that Government employees are relieved from adjudicated liability if the Government itself is adjudicated not liable. The discussion of 28 U.S.C. §2676 in respondents' cited cases —*Satterwhite* v. *Bocelato*, 130 F.Supp. 825, 829 (E.D.N.C. 1955); *Lauterbach* v. *United States*, 95 F.Supp. 479, 482 (W.D. Wash. 1951); *United States* v. *Gilman*, 347 U.S. 507, 509 (1954)—is in terms of a judgment in favor of a claimant *against* the Government as constituting a bar to a claim against the employee, and offers no support for respondents' contention that if an employee is adjudicated liable then a subsequent adjudication in *favor* of the Government would bar enforcement of the earlier judgment against the employee. Respondents cite no cases directly supporting their theory, and petitioners have found none. It is clear that notwithstanding the respondents' contention to the contrary, Judge McMillan's decision in favor of the Government would not bar petitioners' claim against the individual respondents under 28 U.S.C. §2676. Indeed, as discussed above, if the jury had found in favor of petitioners against the individual controllers, the petitioners would have been entitled to a directed verdict against the Government on the basis of *respondeat superior*.

Finally, as a related matter, respondents bury in footnote 5 on page 5, without discussion, the argument that, while petitioners challenge Judge McMillan's failure to submit the case

against the Government to the jury after having initially determined that the jury would render an advisory verdict against the Government, petitioners do not explain the prejudice to petitioners. However, the prejudice was clear and arose in several different ways:

(1) Before even hearing any evidence on the Government's liability, the trial judge expressed the opinion that the Government "got little or no liability" (JA-II, 732). This statement was made during a discussion following the Government's announcement that it had settled the two Eastern Air Lines stewardess cases for $100,000 (JA-II, 726-34). Ordinarily, the petitioners at this point would have asked the trial judge to recuse himself since he had formed an opinion on the merits before hearing the evidence (*United States* v. *Pfizer, Inc.*, 560 F.2d 319, 322 (8th Cir. 1977)); however, since there was to be an advisory jury determination on the Government's liability, counsel decided to forego such a motion;

(2) The jury from the very beginning had been told that it would decide the liability of the United States, yet, when the time came for the jury to deliberate, they were given no instructions with respect to the liability of the Government and were asked to return no verdict with respect to the United States. Under these circumstances, the jury must have believed that the case against the Government lacked merit and had been dismissed by the trial judge. The failure to clarify the situation was obviously prejudicial to petitioners;

(3) Since the District Court announced that it would have an advisory jury, petitioners' counsel structured his case for presentation to the jury. For the District Court to wait until after respondents rested to announce that the jury would not render an advisory verdict was grossly unfair; and

(4) Although prior to closing argument the District Court advised petitioners' counsel that it would instruct on *respondeat superior*, the District Court subsequently refused to do so. It could well have made a difference to the jury to know that the Government would be responsible if the controllers were held

liable. Indeed, the fact that the Government would be responsible for the acts of the controllers was one of the reasons that the Court of Appeals gave for holding that the United States Attorney could represent all the respondents. *See Aetna Casualty & Surety Co.* v. *United States*, 570 F.2d 1197 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978).

Prejudice resulting from a change in trial format has been expressly recognized by the Court of Appeals for the Ninth Circuit in *Pradier* v. *Elespuru*, 641 F.2d 808, 811 (1981):

> "The entire trial took place with the understanding that the jury's verdict would be advisory only. There are frequently significant tactical differences in presenting a case to a court, as opposed to a jury. The parties are entitled to know at the outset of the trial whether the decision will be made by the judge or the jury." 641 F.2d at 811.

It is, therefore, clear that the prejudicial statements of opposing counsel combined with the failure of the District Court to properly charge the jury on petitioners' claims and to control the conduct of the trial and its format, resulted in such prejudice to petitioners that they were denied a fair and impartial trial.

CONCLUSION

The Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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